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HOME INSURANCE COMPANY, **PLAINTIFF,** **v.** **CORNELL-DUBILIER ELECTRONICS, INC., ET AL.,** **DEFENDANTS.**	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY** Civil Action Docket No. MER-L-5192-96
CORNELL-DUBILIER ELECTRONICS, INC., ET AL., **PLAINTIFFS,** **v.** **UNITED INSURANCE COMPANY,** **DEFENDANT.**	Civil Action Docket No. MER-L-2773-02
CORNELL-DUBILIER ELECTRONICS, INC., ET AL., **PLAINTIFFS,** **v.** **COLUMBIA CASUALTY COMPANY, ET AL.,** **DEFENDANTS.**	Civil Action Docket No. MER-L-463-05

DEFENDANTS' CERTAIN EXXON LONDON MARKET INSURERS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CROSS-MOTION TO DISMISS EXXON MOBIL CORPORATION'S CROSSCLAIM AND IN OPPOSITION TO EXXON MOBIL CORPORATION'S MOTION FOR SUMMARY JUDGMENT AGAINST THEM ON INDEMNITY WITH RESPECT TO THE EXXON LONDON POLICIES

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PRELIMINARY STATEMENT

Defendants, Certain Exxon London Market Insurers[1] who severally subscribed to one or more of the London Market Exxon Policies[2] and who have appeared in the captioned action, submit herein their Memorandum of Law in Support of their Cross-Motion to Dismiss Exxon Mobil Corporation's (hereinafter "Exxon's") Crossclaim Against London Market Insurers in Opposition to Exxon's Motion for Summary Judgment Against London Market Insurers On Indemnity With Respect to the London Market Exxon Policies.

Under the terms of the Settlement Agreement and Release entered into between Exxon and Certain Exxon London Market Insurers in June 2000 (hereinafter "2000 Settlement Agreement"), Exxon unambiguously and unconditionally agreed to "defend, indemnify, save, and hold harmless" Certain Exxon London Market Insurers from all claims arising out of the London Market Exxon Policies related to Environmental Liability by any person claiming to be insured under the policies or by any former subsidiary or affiliate of Exxon. The indemnity obligation assumed by Exxon in the 2000 Settlement Agreement was not just in favor of the "Overlap Insurers" (i.e. those London Market Insurers who subscribed to the 1959-1962 Federal Pacific Electric Company (hereinafter "FPE") policies and 1979-1980 Reliance Electric Company (hereinafter "Reliance") policies who have appeared in this action and also subscribed to the London Market Exxon Policies), but all of the London Market Insurers subscribing to the London Market Exxon Policies and participating in the 2000 Settlement Agreement, including those who have not appeared in this action. Exxon has conceded that CDE has never joined the Exxon-only London Market Insurers in the action. Despite CDE's assertion in 2009 of coverage

[1] Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies are identified in "Attachment A" hereto.

[2] The London Market Exxon Policies are listed in "Attachment B" hereto.

under the Exxon London Market Policies, and the 2009 tender of CDE's claim to Exxon on behalf of all of the London Market subscribers to the 1980-1983 policies who participated in the 2000 Settlement Agreement, Exxon has never acknowledged its indemnity obligations to these non-party London Market Insurers. Nonetheless, Exxon has not filed a crossclaim in this action against them seeking to be excused from its indemnity obligations. Exxon has thus failed to join these indispensible parties without whom Exxon's crossclaim cannot proceed.

Furthermore, the 2000 Settlement Agreement unambiguously provides that, notwithstanding any jurisdictional provisions that may appear in the London Market Exxon Polices, the forum for resolution of any disputes under the Agreement shall be **any court in the City of New York**. Clearly, the New Jersey Superior Court is not the proper forum for Exxon's crossclaim seeking to excuse it from its indemnity obligations. Also, the claims asserted in Exxon's crossclaim may not be joined in the instant action under the "entire controversy doctrine," in derogation of the express terms of the Settlement Agreement which require that disputes arising under the Agreement be resolved by a New York court under New York law.

All participating London Market Insurers participating in the 2000 Settlement Agreement and subscribing to the London Market Exxon Policies have now instituted an action in the Supreme Court of the State of New York New York County (hereinafter "New York Action") seeking damages for Exxon's breach of the 2000 Settlement Agreement and a declaration that Exxon is obligated to defend and indemnify them in connection with CDE's Environmental Liability claims arising out of the London Market Exxon Policies under the terms of the 2000 Settlement Agreement. Accordingly, Exxon's crossclaim herein should be dismissed in favor of the more comprehensive New York Action involving all of the London Market Insurers bound

by the 2000 Settlement Agreement which was instituted in the forum contractually agreed upon by the parties.

As to Exxon's motion for summary judgment, Exxon's attempt to avoid its clear defense and indemnification obligations is predicated on the fabrication that CDE had, in fact, asserted claims against the London Market Exxon Policies as early as 1992 and 1998. Exxon then argues that the indemnification obligations under the 2000 Settlement Agreement apply only to "future" claims and not to claims "pending" at the time the Settlement Agreement was entered into. First, the indemnity language is broad and unconditional and a "four corners" reading of the agreement does not limit the indemnity to only future claims. Second, Exxon's suggestion that a claim was "pending" against the policies in 2000 despite the fact that neither CDE nor London Market Insurers were aware of it defies logic; at no time has this Court found that either CDE or the Exxon London Market Insurers were aware of the London Market Exxon Policies that contained endorsements identifying Reliance as an insured prior to 2007/2008, let alone that CDE sought coverage under the policies prior to January 2009. Third, Exxon has repeatedly and consistently taken the position in this action that CDE's Crossclaims did not provide notice of any claims for coverage under the London Market Exxon Policies and did not seek affirmative relief against these Policies. In light of these judicial admissions, Exxon cannot now take an opposite position with respect to its crossclaim to avoid its indemnity obligations. The true irony here is that until May 2010, when CDE indicated that it was going to file a motion for summary judgment with respect to the Exxon Policies, Exxon refused to accept Certain Exxon London Market Insurers' repeated tender of defense and indemnity on the basis that CDE had not asserted a claim under the London Market Exxon Policies.

In a similar vein, for Exxon to argue that Certain Exxon London Market Insurers failed to consult with and cooperate with Exxon in connection with CDE's purported claims against the London Market Exxon Policies going back to the 1990s defies credulity. Not only did Exxon deny that any claims were asserted before 2010, Exxon has consistently taken the position in this case that the London Market Exxon Policies do not provide direct coverage to subsidiary companies such as Reliance and CDE when coverage was provided by its captive insurer, Ancon Insurance Company (hereinafter "Ancon"), directly in favor of Reliance and its subsidiary CDE. In June 2000, Exxon was acutely aware of CDE's Environmental Liability claims based upon Exxon Mobil Risk Management's responsibility for managing both the Ancon and Exxon insurance programs and upon its indemnification of FPE for its environmental claims in this litigation. Exxon did not, however, disclose to the Exxon London Market Insurers that a claim or potential claim by its former subsidiary against the London Market Exxon Policies existed, and that – in Exxon's view – the indemnification provision would be inapplicable to such claim. Moreover, when subpoenaed in this action in May 2001, Exxon failed to disclose the existence of the London Market Exxon Policies and in discovery and motion practice from August 2006 to date, Exxon has insisted that the London Market Exxon Policies do not provide direct coverage to CDE. There is no basis, therefore, for Exxon's assertion that London Market Insurers could have, would have, or should have "consulted or co-operated" with Exxon with respect to a claim which none of the parties recognized to exist.

Exxon may not avoid its obligations to "defend, indemnify, save and hold harmless" Certain Exxon London Market Insurers against CDE's claims on the grounds that the purported defense of or right to "arbitration" was waived. Exxon's convoluted arguments concerning the Court's finding that the ability to arbitrate has been waived are, admittedly, difficult to follow. It

appears that Exxon contends that if this Court ultimately finds that CDE's environmental liability claims are covered under the London Market Exxon Policies, the coverage liabilities imposed will not "arise under the policies" but rather be imposed as the result of a waiver of the right to arbitrate and thus, somehow, fall outside the scope of the contractual indemnity. First, there is no question that any determination of coverage will be based upon an adjudication of the facts and terms and conditions of the policies and not the imposition of liability as a sanction. In the Court's June 26, 2009 Opinion, Honorable Andrew J. Smithson ruled that "the LMI should not be estopped from arguing any defense to providing coverage under the Exxon policies." Based on the Court's ruling, Certain Exxon London Market Insurers did not waive and were not deemed to waive any defenses to coverage under the London Market Exxon Policies, including the right to arbitrate, as a sanction for failure to comply with discovery requests or otherwise.

Second, there has been no subsequent finding of waiver of the right to arbitrate based an any misconduct on the part of Exxon London Market Insurers. In denying Exxon's motion to stay the action and compel arbitration, this Court looked to multiple factors, including the time over which the litigation in is entirety had been pending. This Court did not find that the right to arbitrate was in fact waived in the 1990's or deemed to have been waived as a sanction. Moreover, at no time were Certain Exxon London Market Insurers under any obligation to demand arbitration against CDE or to raise arbitration as a defense to any coverage claims made by CDE under the London Market Exxon Policies. Finally, inasmuch as Exxon cannot demonstrate that an arbitration would yield a different result than litigation, the lack of arbitration cannot relieve Exxon of its contractual obligations.

As noted above, Exxon cannot avoid its indemnification obligations based on the inability to arbitrate. However, in the event the court nonetheless finds that the waiver of the

right to arbitrate could be considered, the relief sought is premature. The Appellate Division denied Exxon's motion for leave to appeal from the trial court's denial of Exxon's Motion to Stay Litigation in Favor of Arbitration and to Compel Arbitration and dismissed the notice of appeal "as of right" as interlocutory. Until Exxon's appeal on the trial court's ruling regarding the denial of the motion to arbitrate is final, Exxon is under a continuing obligation to provide a defense to London Market Insurers.

STATEMENT OF FACTS

A. Relevant Insurance Policies

Certain London Market Insurers appearing in this action subscribed to one or more umbrella or excess umbrella policies issued to FPE effective May 21, 1959 to July 1, 1962 and to Reliance effective March 29, 1979 to July 1, 1979 and July 1, 1979 to July 1, 1980. CDE was acquired by FPE in February 1960 and became an insured under FPE's London Market policies as of the date of acquisition. FPE and CDE were then acquired by Reliance in March 1979. FPE was made an additional insured by endorsement under the London Market excess umbrella policies subscribed in favor of Reliance. As a subsidiary of FPE, CDE was an insured under the Reliance policies. Subsequent to Reliance's acquisition of FPE and CDE in March, 1979, Reliance was acquired by Exxon Corporation in late 1979. While some consideration was given to merging Reliance into the Exxon coverage program, ultimately it was decided to keep the existing Reliance policies in place until expiration at July 1, 1980.

Upon expiration of the existing Reliance policies, Exxon captive insurer, Ancon Insurance Company (hereinafter "Ancon"), issued excess general liability coverage to Reliance (Policy No. 7/147), with annual limits of liability ranging from $210 million to $400 million, effective July 1, 1980 through November 1, 1985. The coverage attached in excess of $1

million primary limits provided by Northwestern National Insurance Company. The Ancon policy provided direct third party liability coverage to Reliance and its subsidiaries, including CDE and FPE. (See, the Ancon policy annexed to the Certification of George L. Maniatis submitted in support hereof (hereinafter the "Maniatis Certification") at Ex. 10).

In addition to the FPE and/or Reliance policies described above, Certain Exxon London Market Insurers severally subscribed, each in their respective proportionate share, to one or more of the Broad Form Liabilities London Market Exxon Policies issued to "(i) EXXON CORPORATION and its Affiliated Companies as they are now or may be hereinafter constituted and/or (ii) ANCON INSURANCE COMPANY, S.A. as insurers, either directly or indirectly as means of reinsurance, of Exxon Corporation and its Affiliated Companies as they are now or may be hereinafter constituted" for the period January 1, 1980 to November 1, 1983. Reliance was listed as a Named Insured by endorsement under the London Market Exxon Policies effective July 1, 1980. The London Market Exxon Policies provide direct excess coverage to Exxon but also respond as reinsurance of Ancon in connection with direct Ancon policies issued to Exxon subsidiaries such as Reliance. The London Market Exxon Policies attach in excess of a $10 million self insured retention. (See, Ex. M to the Certification of John M. Toriello submitted in support of Exxon's instant Motion for Summary Judgment (hereinafter the "Toriello Certification")). Therefore, Ancon issued policies to subsidiary companies of Exxon, with the benefit of reinsurance from London Market Insurers that mirrored the same coverage that was provided to Exxon under its direct excess third party liability policies. Curiously, CDE is not presently asserting any claims against the Ancon policies despite the low attachment point of $1 million as compared to the London Market Exxon Policies which attach in excess of a $10

million self-insured retention for which CDE would be responsible should those policies be triggered by CDE's losses.

Most importantly, there are many additional Lloyd's syndicates and London Market Insurance Companies that subscribed to the London Market Exxon Policies but **did not subscribe** to the FPE/Reliance policies and have not been joined in or appeared in the New Jersey Action.[3]

B. New Jersey Action and Pleadings

On or about December 19, 1996, Home Insurance Company ("Home") commenced the New Jersey Action against FPE, its former subsidiary, CDE, and 30 of their insurers, including "Certain Underwriters of Lloyd's," seeking declaratory judgment as to the rights and obligations of the parties under unidentified insurance policies in connection with various environmental claims involving CDE and FPE. The Complaint did not identify any specific Lloyd's syndicates, not did it name any London Market Insurance Companies. Among the Underlying Environmental Claims included in the Complaint was the South Plainfield, New Jersey site. In 1997, Home served a First Amended Complaint. (See, Ex. D to the Toriello Certification).

On October 20, 1998, CDE filed an Answer to Home's Amended Complaint, with Crossclaims against "Insurer Defendants." (See, Ex. E to the Toriello Certification). Home's Amended Complaint named as defendants "Certain Underwriters at Lloyds" and alleged that, at times relevant to the action, Certain Underwriters at Lloyds, London issued one or more policies of insurance to CDE and/or FPE. On or about November 1, 2002, CDE filed a Second Amended Answer, Separate Defenses, Counterclaims, Crossclaims, and Jury Demand. (See, Ex. F to the Toriello Certification). CDE's Second Amended Answer with Crossclaims sought a declaration that each "Crossclaim Insurer" has a duty to reimburse CDE for all defense costs and "indemnify

[3] The Exxon-only London Market Insurers are listed in "Attachment C" hereto.

CDE for all amounts CDE has paid as damages in the Underlying Matters [including the South Plainfield, N.J. Site], towards which said Crossclaim Insurer has not made indemnity payments, or may be required to pay in the future, and ordering that Crossclaim Insurer to pay such amounts." Neither CDE's Answer to Home's Amended Complaint, with Crossclaims against "Insurer Defendants" nor CDE's Second Amended Answer, Separate Defenses, Counterclaims, Crossclaims, and Jury Demand identified the London Market Exxon Policies or the insurers subscribing thereto. CDE's Crossclaims only identify "Insurer Defendants."

On or about December 2, 2002, as they had done in response to earlier pleadings, Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies, including the "Overlap Insurers," all of whom were specifically identified in their pleadings, appeared in the action and answered CDE's Second Amended Crossclaim in respect of their several subscription to one or more of the policies issued to FPE and/or Reliance for the periods 1959-1962 and 1979-1980. (See, Ex. G to the Toriello Certification). As more fully set forth below, the London Market Insurers subscribing to the FPE and/or Reliance Policies first became aware that Reliance was identified as an insured in an endorsement to the November 1, 1984 London Market Exxon Policy; they subsequently learned of the same endorsement in the 1980-1983 policies. Further, London Market Insurers were not aware of, and indeed there were no claims by CDE against the London Market Exxon Policies until January 2009, with the filing of the motion for sanctions.

C. CDE'S Environmental Liability Claims

As early as May 1, 1989, CDE submitted a claim for coverage to Exxon's captive insurer, Ancon Insurance Company, S.A. under Ancon Policy No. 7/147 with respect to seven sites including the South Plainfield, New Jersey site. (See, Ex. 7 to the Maniatis Certification). The

Ancon policy provided direct third party liability coverage to Reliance and its subsidiaries, including CDE and FPE. On March 27, 1992, CDE notified Ancon Insurance Company, S.A. of an administrative order dated February 14, 1992 issued by the New Jersey Department of Environmental Protection regarding the South Plainfield site. The March 27, 1992 notice letter also stated: "CDE also claims coverage and makes a similar demand under all other policies which you have issued on its behalf, ever, if not specifically listed." (Ex. 8 to the Maniatis Certification).

On June 15, 1992, D. Christopher Heckman, counsel for Exxon Insurances Corporation, acknowledged receipt of CDE's March 27, 1992 letter on behalf Ancon Insurance Company, Inc. as successor to Ancon Insurance Company, S.A. Mr. Heckman advised CDE's counsel that all future correspondence should be directed to him "as counsel for Exxon Insurances Corporation which handles claims for Ancon Insurance Company, Inc." (See, Ex. 11 to the Maniatis Certification). Exxon Insurance Services did not advise that the Ancon coverage was no longer applicable, or that the London Market Exxon Policies co-insured with the Ancon policies. Exxon Insurances Services did not identify any of the London Market Exxon Policies as potentially providing coverage to CDE for its Environmental Liability claims. Although Ancon Policy No. 7/147 contained an arbitration provision, Exxon Insurances Corporation on behalf of Ancon did not assert the right to arbitration under the Ancon policy with respect to CDE's South Plainfield claim. Exxon Insurance Services, Inc. merged into Exxon Risk Management Services in the 1990s, which in turn merged into ExxonMobil Risk Management, Inc. in 2000. Mr. Thomas Chasser, the former Vice President of ExxonMobil Risk Management, Inc. (hereinafter "EMRM") (formerly Exxon Insurances Services Corp.) averred in the New Jersey Action that

EMRM acted as manager of the Ancon and Exxon insurance programs. (See, Ex. 12 to the Maniatis Certification).

On or about March 27, 1992, CDE sent a virtually identically worded letter that it sent to Ancon to "Lloyds Underwriters" and listed in the caption six policies subscribed to by London Market Insurers in favor of Reliance effective March 29, 1979 through July 1, 1980. In a February 13, 1997 notice of claim letter with respect to the South Plainfield site, in addition to the six policies referenced in its previous notice letters, CDE also listed in the caption "[Various Placements], Effective 5/29/59-7/1/62 (underlying coverage exhausted)." CDE did not identify the London Market Exxon Policies in any of the notice of claim letters sent to "Lloyds Underwriters" at any time. (See, Ex. 13 to the Maniatis Certification).

On or about August 13, 2001, CDE wrote to "Mendes & Mount, LLP" in connection with a Notice of Claim regarding the Dismal Swamp Superfund Site. The letter was written "on behalf of your insured, Cornell-Dubilier Electronics, Inc." and requested that they let CDE "know as soon as possible if your company is willing to defend and indemnify CDE." (See, Ex. 14 to the Maniatis Certification). On August 16, 2001, Mendes & Mount wrote to CDE's counsel acknowledging receipt of CDE's August 13, 2001 letter and noted that: "your letter was not directed to a particular insurer or to any particular policies." Id. On October 25, 2001, those London Market Insurers subscribing to the 1959-1962 and 1979-1980 policies issued to FPE and/or Reliance appearing in the New Jersey Action issued a reservation of rights with respect to CDE's claim in connection with the Dismal Swamp Superfund Site. Id. CDE did not identify Certain London Market Exxon Insurers or the London Market Exxon Policies in its notice of claim letter regarding the Dismal Swamp Superfund Site.

Exxon has taken the position in the New Jersey Action that "nothing in CDE's crossclaims identifies the Exxon Policies or the more than 230 insurance companies and Lloyd's syndicates that subscribed to the Exxon Policies . . . There is also simply no claim for affirmative relief in the Crossclaims with respect to the Exxon Policies." (See, Ex. 15 to the Maniatis Certification). Exxon has further taken the position in the New Jersey Action that "[w]ithout a proper identification of the Exxon Policies, the London Market Insurers (and its indemnitor) lack sufficient notice of claims against them. The London Market Insurers rightfully read the Complaint to refer to the FPE/CDE London Insurance - the 11 policies CDE noticed and that are referenced in the London Market Insurers' Answer to CDE's Crossclaims. . . And CDE's admission that it did not even know of the Exxon Policies until 2008, demonstrates that not even CDE intended for its Crossclaims in this action to include claims under the then-unknown Exxon Policies. CDE's Crossclaims do not provide notice of any claims for coverage under the Exxon Policies and do not seek affirmative relief against these Policies." Id.

Significantly, at the September 10, 2010 oral argument in connection with Exxon's motion to stay litigation in favor of arbitration in response to the Court's questioning whether Certain Exxon London Market Insurers were on notice of CDE's claims by virtue of the service of suit provisions contained in the policies, Exxon's counsel stated that those insurers never realized those London Market Exxon Policies were at issue. In response to further questioning by the Court as to whether for the past year Certain Exxon London Market Insurers could have intervened in this action, Exxon's counsel acknowledged that they tendered the defense of CDE's claim (March 2009) and Exxon intervened as soon as the claim was made (CDE's motion for summary judgment in June 2010). (Ex. K at pp. 27-28 to the Toriello Certification).

Prior to January 2009, those London Market Insurers who only subscribed to the London Market Exxon Policies, were not aware of any of CDE's Environmental Liability claims. Once they became aware of CDE's claims against the London Market Exxon policies, those London Exxon Market Insurers participating in the 2000 Settlement Agreement tendered the defense and indemnity of CDE's claims to Exxon. (See, Ex. 5 to the Maniatis Certification). The undisputed evidence presented above is that Exxon has repeatedly and consistently taken the position that CDE did not assert any crossclaims against the London Market Exxon Policies in this litigation and, furthermore, that no claim had actually been asserted by CDE against the London Market Exxon Policies prior to the filing of CDE's motion for summary judgment in June 2010.

D. Exxon's Knowledge of CDE'S Claims in the New Jersey Action

Exxon has been aware of CDE's environmental claims not only through the notifications to Ancon, but also through its continuing involvement in FPE claims. Exxon is bound to indemnify FPE for its pollution liabilities pursuant to a 1986 indemnification agreement between Exxon and Rockwell Automation. Reliance and FPE have recently been acquired by Baldor. The Baldor Preliminary Prospectus Supplement states:

> The Acquired Business is indemnified by Exxon Mobil Corporation ("Exxon") for substantially all costs associated with environmental matters of Federal Pacific Electric Company, a non-operating subsidiary of Reliance Electric. The indemnity right is being transferred to Rockwell Automation and Rockwell Automation has agreed to indemnify Baldor with respect to costs associated with environmental claims of Federal Pacific Electric Company. The indemnification agreement covers claims for which Reliance Electric gave notice to Exxon before December 29, 2006.

(Ex. 18 to the Maniatis Certification).

In light of its interest in any insurance recoveries FPE might make, Exxon has monitored the developments in this action since its inception and thus was aware of CDE's claims in this

action. In fact, FPE was also involved in the South Plainfield site and FPE and CDE litigated the 2004 South Plainfield liability trial against London Market Insurers in tandem.

Most importantly, despite FPE's and CDE's assertions that they were not insured for environmental liabilities as of July 1, 1980, in or about May 2001, in the New Jersey Action, a subpoena was served by Allstate Insurance Company on Exxon which expressly requested Exxon to produce:

> All comprehensive general liability policies issued to Exxon Corporation or any of its affiliated companies, under which Cornell-Dubilier Electronics, Inc./Federal Pacific Electric Company, UV Industries and or Reliance Electric Company is an insured, a named insured or additional insured or otherwise entitled to coverage, under policies in effect during the period 1980 to 1986.

(Ex. 16 to the Maniatis Certification).

In response to the subpoena, by letter dated July 3, 2001, Exxon's counsel provided to Allstate's counsel a copy of Ancon Policy 7/147 issued to Reliance and its affiliated companies. None of the London Market Exxon Policies listing Reliance as an additional Named Insured were ever produced by Exxon in the New Jersey Action pursuant to the subpoena, nor did Exxon provide any information reflecting the existence of such policies. Accordingly, by 2001 Exxon was undisputedly aware of the insurers' attempts to locate all post July 1, 1980 coverage in favor of Reliance, FPE and CDE in response to CDE's claims herein, **none** of the London Market Exxon Policies listing Reliance as an additional Named Insured by endorsement were ever produced by Exxon to the insurers in the New Jersey Action pursuant to the subpoena.

In or about 2003, Ancon was joined as a third party defendant by Allstate over the opposition of CDE and FPE. (See, Ex. 21 to the Maniatis Certification). Ancon did not demand arbitration even though the Ancon policy contains an arbitration provision. In or about July 2007, CDE and FPE moved for a summary adjudication that the Ancon policy does not provide

coverage for their environmental liabilities. The motion was denied, and discovery directed to the Ancon policies ensued. In the course of that discovery, Mr. Thomas Chasser, the Ancon witness, maintained, as does Exxon today, that the Ancon policy is the only direct excess general liability insurance available to Reliance and its subsidiaries. Thus, throughout the long history of this litigation, Exxon has been aware of the South Plainfield claim and that CDE sought coverage for such claim, at least for policies in effect prior to July 1, 1980. Not only did Exxon fail to "recognize" or acknowledge the potential for a direct claim by CDE against the London Market Exxon Policies, it has actively argued against such coverage.

E. The California Coverage Action

On or about December 22, 1995, Exxon filed a Complaint for Declaratory Relief in an action entitled Exxon Corporation, et al. v. Insurance Company of North America, et al., No. 971376, Superior Court of the State of California, In and For the City and County of San Francisco (hereinafter "California action"). (Ex. 23 to the Maniatis Certification). In addition to certain Underwriters at Lloyd's, London and various London Market companies, numerous domestic insurers were joined as defendants. The litigation encompassed policies issued over the period 1943 through 1985, including the London Market Exxon Policies at issue herein. Exxon sought damages and/or declaratory relief with respect to hundreds (if not thousands) of underlying pollution claims involving Refining/Chemical Plant Operations, service stations, waste disposal sites, Terminals, Uranium Mills and other sites. Paragraph 15 of the Complaint states:

> To the extent any Policy contains a valid and enforceable provision that disputes arising under the Policy must be resolved by arbitration upon the request of a party, Exxon will abide by the arbitration provision if an insurer that issued or subscribed to the Policy requests that this dispute be arbitrated.

(Ex. 23 to the Maniatis Certification).

Significantly, neither Exxon nor Certain Exxon London Market Insurers invoked the arbitration provisions contained in the London Market Exxon Policies with respect to Exxon's environmental claims in the California action. The London Market Exxon Policies contain an arbitration provision as follows: "In the event of any difference arising between the Insured and the Insurers with reference to this Insurance such difference shall at the request of either party ... be referred to three disinterested arbitrators, ..." (See, Ex. 24 to the Maniatis Certification). Under the terms of the London Market Exxon Policies, disputes arising between the parties are subject to arbitration only at the request of either party. None of the parties to the London Market Exxon Policies are required to demand arbitration.

Thus, the arbitration provision contained in the London Market Exxon Policies is not "mandatory" as alleged by Exxon and, in an environmental action involving potentially thousands of pollution sites and over a billion dollars in insurance coverage limits, neither Certain London Market Insurers nor Exxon ever sought to invoke their arbitration rights. Exxon's arguments regarding the importance of raising an arbitration defense ring hollow.

F. June 2000 Settlement Agreement

On or about June 30, 2000, Exxon and Certain Exxon London Market Insurers entered into a Settlement Agreement and Release. The Release afforded to London Market Insurers by Exxon under Section 3.1 is applicable to:

> "...any and all past, present or future claims, of any type whatsoever, that Exxon ever had, now has or hereafter may have: (i) for insurance coverage...in connection with Environmental Liability; and ii) arising out of or relating to any act, omission, representation or conduct of any sort in connection with the Policies..."

(Ex. A to the Certification of D. Christopher Heckman submitted in support of Exxon's instant Motion for Summary Judgment (hereinafter the "Heckman Certification")).

The "Releases" section also provides that:

> "Exxon further waives any claim or action against London Market Insurers for bad faith, breach of duty, or punitive, exemplary or extra-contractual damages of any type, arising from the actual or potential obligation (s) from which the London Market Insurers are released pursuant to Paragraph 3.1 above."

Id.

The London Market Exxon Policies are identified in the 2000 Settlement Agreement as policies subject to the Releases set forth in Section 3.1 of the 2000 Settlement Agreement and Certain Exxon London Market Insurers herein are beneficiaries of the Releases contained in Section 3.1 of the 2000 Settlement Agreement. Id.

The June 2000 Settlement Agreement also contains an Indemnity provision, Section 4.1, under which Exxon

> ". . . agrees that it shall **defend, indemnify, save and hold harmless each of the LONDON MARKET INSURERS that is entitled to benefit from the mutual release set forth in Section 3 above from and against all claims**, including claims for indemnity, defense, subrogation, reimbursement, and/or contribution arising out of the POLICIES and relating to ENVIRONMENTAL LIABILITY asserted by: . . . (b) any PERSON . . . claiming to be insured under the POLICIES; . . . (d) any former SUBSIDIARY or AFFILIATE of EXXON. . ." (emphasis added).

Id.

CDE is a former subsidiary of Exxon and claims to be insured under the London Market Exxon Policies. CDE's claims against the London Market Exxon Policies relate to "Environmental Liability" as defined in the 2000 Settlement Agreement. The 2000 Settlement Agreement states that "'LONDON MARKET INSURERS' shall mean all the Names, Underwriters and syndicates at Lloyd's, London and all the companies doing business in the London Insurance Market which severally subscribed, each in his or its own proportionate share, to one or more of the POLICIES . . ." Id. Therefore, Exxon's obligation to indemnify Certain Exxon London Market Insurers is not limited to the "Overlap" London Market Insurers appearing in this action, but extends to the non-party participants in the 2000 Settlement

Agreement as well. Moreover, Exxon's indemnity obligations are broad and are not limited in scope to only "future" claims as contended by Exxon.

The 2000 Settlement Agreement expressly provides in Section 10.2 that the:

> "forum for resolution of any disputes under this AGREEMENT, or any claims presented under the POLICIES shall be any court in the City of New York, the jurisdiction to which the PARTIES hereby consent. The procedural and substantive law to be applied in resolving any disputes referenced in Paragraphs 10.1 or 10.2 shall be the internal laws of the State of New York. . . ."

Id.

Pursuant to the terms of the Settlement Agreement, the sole forum for the resolution of any disputes arising under the Settlement Agreement is a court in the City of New York. In fact, all London Market Insurers subscribing to the London Market Exxon Policies and participating in the June 2000 Settlement Agreement have instituted a comprehensive New York Action, seeking a judgment that Exxon has breached the 2000 Settlement Agreement and a declaration that Exxon is obligated to defend and indemnify them in connection with CDE's Environmental Liability claims arising out of the London Market Exxon Policies under the terms of the 2000 Settlement Agreement. (See, Ex. 32 to the Maniatis Certification).

Section 4.1 of the 2000 Settlement Agreement on its face does not limit the defense and indemnity obligations to "future" claims. Further, the "Environmental Liability" claims against which protection is afforded, by definition include in Section 1.8.1 of the Agreement to "mean any and **all known or unknown, past, existing, potential or future claims,** demands, suits, actions . . . with respect to POLLUTION, . . ." (emphasis added). (Ex. A to the Heckman Certification). In addition, the only exceptions to the obligations imposed under section 4.1 are set forth in Section 4.4 of the Agreement. The only relevant exception states that the Section 4.1 obligations do not apply to: "(b) any expense or cost already incurred by the LONDON

MARKET INSURERS before the mutual release set forth in Section 3 above becomes effective; . . ." Id. This provision not only highlights the absence of a "future claims" limitation but makes clear that the defense and indemnification obligations apply to future expenses incurred in pending claims.

G. London Market Insurers' Tender of Defense and Indemnity to Exxon

Certain Exxon London Market Insurers were not aware of the existence of the London Market Exxon Policies listing Reliance as an additional Named Insured by endorsement until July 2007. Certain Exxon London Market Insurers initially became aware of the endorsement identifying Reliance as an insured under the November 1, 1984 London Market Exxon Policies in July 2007 and later in 2007 as to the 1980-1983 policies. Further, based upon the deposition testimony of Ancon/Exxon witnesses in August 2006 and October 2007, the information and testimony provided by Peter Wilson, lead underwriter on the London Market Exxon Policies, in August 2007 and October 2008 and Exxon's failure to identify said policies in response to the 2001 subpoena, Certain Exxon London Market Insurers concluded that CDE's direct excess general liability coverage was placed with Ancon only, and not the London Market Exxon Policies which afforded reinsurance to Ancon. (See, Ex. H at pp. 3-4, 8 to the Toriello Certification). Prior to January 2009, CDE did not advise of, assert in any other manner or state a claim for coverage against the London Market Exxon Policies.

On or about January 7, 2009, CDE filed a Motion Against London Market Insurers for Sanctions under which: London Market Insurers would be estopped from denying coverage under the London Market Exxon Policies or asserting any defenses thereto; joint and several liability would be imposed on London Market Insurers instead of equitable allocation under Carter-Wallace; and London Market Insurers would be required to pay CDE's expenses in this

litigation based on the late disclosure of the London Market Exxon Policies. In its motion, CDE claimed that until production of copies of the London Market Exxon Policies in or about October 2008, it did not realize that it was an insured under the London Market Exxon Policies. (See, Ex. 4 to the Maniatis Certification).

On March 18, 2009, pursuant to the terms of the June 2000 Settlement Agreement, Certain London Market Insurers notified Exxon that "[r]ecently, CDE, having consistently denied that it was insured after 1980, changed its position and asserted coverage as an insured under policies in force from 1980 through 1983 severally subscribed by London Insurers that name 'Exxon Corp.' (now Exxon) as the insured (Exxon London Policies.)" (Ex. 5 to the Maniatis Certification). In addition, Certain London Market Insurers advised Exxon: "As you may be aware (and as Ancon's counsel is aware) there are motions pending that impact the Exxon London Policies that Exxon may determine may require its immediate consideration." Id. On March 27, 2009, Exxon wrote to counsel for Certain London Market Insurers in response to their March 18, 2009 tender of CDE's claims arising from "Environmental Liability" as that term is defined in the 2000 Settlement Agreement against the London Market Exxon Policies and stated: "**As we understand the pending claims in the referenced litigation, no such claim has been made.**" (Ex. 6 to the Maniatis Certification).

The Honorable Andrew J. Smithson, J.S.C. in an Order and Opinion in the New Jersey Action dated June 26, 2009 denied CDE's motion for sanctions except to the extent that the Opinion permitted the parties to "engage in any discovery reasonably necessary to incorporate the Exxon policies into the case ..." (See, Ex. H at pp. 10-11 to the Toriello Certification). In its Opinion, the Court found that "the LMI did not affirmatively destroy evidence or withhold testimony" and held that "the dismissal of the LMI's pleadings and defenses is not the

appropriate remedy. **Similarly, the LMI should not be estopped from arguing any defense to providing coverage under the Exxon policies.**" (Ex. H at p. 9 to the Toriello Certification, emphasis added). The Court accepted that "the LMI had no knowledge of these Exxon policies and did not have a design to mislead CDE." Id. In fact, Judge Smithson specifically found at p. 8 of his June 26, 2009 Opinion that "In its original notice of claims, CDE identified the LMI's policies from 1959-1962 and 1979-1980." The June 26, 2009 Order also re-opened and extended discovery to November, 2009 to permit the parties ". . . to engage in any discovery reasonably necessary to incorporate the Exxon policies into the case." (Ex. H at pp. 10-11 to the Toriello Certification).

Subsequent to March 2009, the Exxon London Market Insurers repeatedly requested that Exxon honor its defense and indemnity obligations as set forth in the 2000 Settlement Agreement as it had become abundantly clear that CDE was now asserting a claim against the London Market Exxon Policies. Equally clear, Exxon refused to undertake the defense and indemnity of these insurers based on the assertion that no claim had been made by CDE until May 2010. For example, on July 27, 2009, counsel for London Market Insurers again wrote to Exxon and stated:

> We believe that CDE has made clear that it is pursuing coverage against the 1980-1985 London Market policies issued to Exxon on the premise that, as a wholly-owned subsidiary of Reliance Electric, it is a direct insured under the policies. The recently propounded discovery attached confirms CDE's intent to proceed with its claims against the Exxon policies. Accordingly, London Market Insurers hereby tender the defense of CDE's claims against the Exxon policies under the terms of the Settlement Agreement as set forth above. London Market Insurers also request Exxon to confirm that it will fully indemnify them from any liability that they may incur to CDE in connection with claims relating to ENVIRONMENTAL LIABILITY, including those at issue in the captioned litigation. This tender includes the discovery propounded by CDE, all costs associated therewith, as well as any discovery to be undertaken by London Market Insurers with respect to the claims against the Exxon policies.

(See, Ex. 25 to the Maniatis Certification).

On July 31, 2009, Mr. Heckman, on behalf of Exxon, responded to Certain London Market Insurers' July 27, 2009 letter and reiterated: "**We are not aware of any claim made by Cornell-Dubilier Electronics, Inc. ("CDE") against the 1980-85 London Market Exxon Policies.**" (See, Ex. 26 to the Maniatis Certification, emphasis added). On August 14, 2009, counsel for Certain Exxon London Market Insurers wrote to Exxon enclosing a copy of an e-mail dated July 28, 2009 from CDE's counsel in the New Jersey litigation wherein he states: "It is CDE's position that it is covered under the Exxon Policies that Lloyds has produced. When CDE completes discovery as permitted by the Court's recent order, CDE will make an appropriate motion to assert its right to the additional coverage in the NJ case." (See, Ex. 27 to the Maniatis Certification). Certain Exxon London Market Insurers advised Exxon that they "believe that the above e-mail clearly evidences CDE's view that it is entitled to coverage and is claiming coverage under the Exxon policies and intends to formally add its claim to the pending New Jersey litigation. CDE's claim clearly falls within the terms of the Release and Indemnity provisions of the 2000 Settlement Agreement and Release." Id. Also, Certain Exxon London Market Insurers reiterated their request that "Exxon undertake the defense of CDE's claims against the Exxon policies or agree to reimburse London Market Insurers' attorney fees and expenses associated with defending CDE's claims against the Exxon Policies." Id.

Further to their repeated requests to Exxon to reimburse them for or to undertake the defense with respect to CDE's claims against the London Market Exxon Policies, on October 21, 2009, counsel for Certain Exxon London Market Insurers forwarded by e-mail to Exxon CDE's Objections and Responses to London Market Insurers' and North River Insurance Companies' Interrogatories and Document Requests Concerning Coverage Under the Exxon Policies. Certain Exxon London Market Insurers advised Exxon:

> "Please note CDE's response to Interrogatory No. 27 on page 18 which unequivocally states: **'CDE does contend that there is coverage under the Exxon Policies for the claims at issue.'** It is now readily apparent that CDE is claiming coverage under the Exxon Policies for its environmental claims and inasmuch as CDE's claim is within the scope of defense and indemnification provisions of the 2000 Settlement Agreement, London Market Insurers reiterate their request that Exxon undertake the defense of CDE's claims against the Exxon policies or agree to reimburse London Market Insurers' attorney fees and expenses associated with defending CDE's claims against the Exxon Policies." (emphasis added).

(Ex. 28 to the Maniatis Certification).

Exxon's Senior Counsel, Mr. Heckman, in response to Certain Exxon London Market Insurers' October 21, 2009 e-mail, maintained "CDE is seeking discovery in accordance with the court's sanctions order - this would not be covered by the indemnity even if a claim had been made by CDE. **However, we have seen no such claim. If an insurance claim has been made, please forward to me for review.**" (Ex. 28 to the Maniatis Certification, emphasis added.) Therefore, for over a year, Exxon refused to acknowledge its obligation to defend and indemnify Certain Exxon London Market Insurers on the grounds that CDE's had not asserted a claim.

In sum, on March 18, 2009, July 27, 2009, August 14, 2009 and October 21, 2009, each of the London Market Insurers participating in the 2000 Settlement Agreement notified Exxon of CDE's contentions and claims against the London Market Exxon Policies, and requested acknowledgment of Exxon's defense and indemnity obligations under the Settlement Agreement. Exxon refused to acknowledge that CDE had made a claim against the London Market Exxon Policies that are the subject of the 2000 Settlement Agreement.

At last, on May 11, 2010, Exxon, in response to Certain London Market Insurers' March 18, 2009 tender letters, advised London Market Insurers' counsel that in light of CDE's May 7, 2010 draft letter to the Court in the New Jersey Action wherein "it appears to advise that CDE intends to seek coverage for Environmental Liability under policies that certain London Insurers

issued to Exxon Corporation in the period 1980 – 1983 (the "Exxon Policies") . . . . Exxon advises that it will provide a defense pursuant to Section 4.3 of the Settlement Agreement **to those London Market Insurers (as that term is defined in the Settlement Agreement) which have also appeared in the New Jersey Action** to the extent that CDE seeks to obtain coverage for Environmental Liability under the Exxon London Policies." (Ex. I to the Toriello Certification, emphasis added). Exxon's acceptance of the tender of the Overlap Insurers' defense was subject to certain conditions. Exxon also reserved its rights with respect to the indemnification of London Market Insurers under the terms of the Settlement Agreement. Despite its acknowledgment of its obligation to defend the Overlap Insurers against CDE's claims pursuant to the express terms of the 2000 Settlement Agreement, Exxon has refused to assume the defense of any London Market Insurer with respect to claims for sanctions, fines or penalties against said Insurers, including CDE's motions for sanctions. Exxon has also refused to reimburse any London Market Insurer for costs, fees, sanctions or expenses incurred prior to May 11, 2010.

In addition, in its acceptance of the tender of the defense against CDE's claims, Exxon sought to impose the following condition: "This agreement to provide a defense...is subject to the continued cooperation of the London Market Insurers in responding to and in defending against the claims for Environmental Liability...." Id. Such condition sought to be imposed by Exxon is outside the scope of the Settlement Agreement. In any event, Certain Exxon London Market Insurers have fully co-operated with Exxon in responding to and in defending against CDE's claims and Exxon is obligated to continue to defend Certain Exxon London Market Insurers in connection with CDE's claims against the London Market Exxon Policies.

H. Exxon's Motion to Stay Litigation in Favor of Arbitration

On July 30, 2010, Exxon filed a Motion to Stay Litigation in Favor of Arbitration and to Compel Arbitration in the New Jersey Action with respect to CDE's Environmental Liability claims against the London Market Exxon Policies. On September 10, 2010, the Honorable Douglas H. Hurd in the New Jersey Action denied Exxon's Motion to Stay Litigation in Favor of Arbitration and to Compel Arbitration on the grounds of waiver based on three factors: (1) the time elapse from the commencement of the litigation; (2) the amount of litigation undertaken; and (3) the prejudice to CDE. (See, Ex. K at pp. 29-32 to the Toriello Certification).

On December 9, 2010, the Appellate Division denied Exxon's motion for leave to appeal from the Court's denial of Exxon's Motion to Stay Litigation in Favor of Arbitration and to Compel Arbitration. (See, Ex. L to the Toriello Certification). The Appellate Division further stated "The Federal Arbitration Act does not provide a basis for appeal as of right, nor, in this plenary action, does the New Jersey Arbitration Act provide a basis for appeal as of right. Accordingly, the appeal is dismissed as interlocutory." Id. Therefore, there is no final ruling on Exxon's appeal and Exxon's appellate rights as to the Court's ruling are preserved.

ARGUMENT

I. Exxon's Crossclaim Should be Dismissed In Favor of the New York Action

Exxon's Crossclaim against the "Overlap" London Market Insurers seeking to avoid its indemnity obligations under the June 2000 Settlement Agreement was clearly brought in the wrong forum. The June 2000 Settlement Agreement unambiguously provides in Section 10.2: "forum for resolution of any disputes under this AGREEMENT, or any claims presented under the POLICIES shall be any court in the City of New York, the jurisdiction to which the

PARTIES hereby consent." Notwithstanding this provision, Exxon elected, nonetheless, to seek resolution of this dispute between the parties in this New Jersey action.

Moreover, all of the subscribing London Market Insurers to the London Market Exxon Policies who were parties to the 2000 Settlement Agreement have now filed suit in the Supreme Court of the State of New York seeking a judgment that Exxon has breached the 2000 Settlement Agreement and a declaration that Exxon is obligated to defend and indemnify them in connection with CDE's Environmental Liability claims arising out of the London Market Exxon Policies under the terms of the 2000 Settlement Agreement. This action, filed in the jurisdiction and venue mandated by the 2000 Settlement Agreement, involves all of the parties to the 2000 Settlement Agreement and addresses Exxon's contractual obligations to defend and indemnify the settling London Market Insurers therein.

Exxon's crossclaim should also be dismissed because Exxon has failed to join necessary parties. The Court in Garnick v. Serewitch, 39 N.J. Super. 486, 499, 121 A.2d 423 (Ch. 1956), stated that: "[a] contract may not be construed in the absence of a party thereto."

Rule 4:28-1. Joinder of persons needed for just adjudication, provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party to the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.

Exxon's Crossclaim is only directed against the "Overlap" London Market Insurers, and fails to include all of Certain Exxon London Market Insurers who are parties to the 2000 Settlement Agreement. Accordingly, complete relief cannot be granted if Exxon's Crossclaim were to remain in New Jersey and be adjudicated by this Court. Due to Exxon's failure to join

all London Market Insurers subscribing to the 2000 Settlement Agreement, and in accordance with the mandatory forum selection clause in the Settlement Agreement, Exxon's Crossclaim should be dismissed in favor of the New York action.

New Jersey's entire controversy doctrine does not preclude dismissal of Exxon's Crossclaim against Certain Exxon London Market Insurers in favor of the New York Action. The Supreme Court of New Jersey has explained that the entire controversy doctrine recognized by New Jersey courts suggests that "all parties involved in a litigation should ... present in that proceeding all of their claims and defenses that are related to the underlying controversy."[4] Highland Lakes Country Club and Community Association v. Nicastro, 201 N.J. 123, 125, 988 A.2d 90, 91 (2009); Cogdell v. Hospital Center at Orange, 116 N.J. 7, 15, 560 A.2d 1169, 1172 (1989) ("the entire controversy doctrine embodies the principle that the adjudication of a legal controversy should occur in one litigation in only one court; accordingly, all parties involved in a litigation should at the very least present in that proceeding all of their claims and defenses that are related to the underlying controversy").

However, in this case, Exxon's Crossclaim relates to a separate and distinct dispute arising under a different contract than the insurance policies at issue in the underlying controversy and involves additional London Market Insurers that were not joined in Exxon's Crossclaim. *See, e.g.*, Oltremare v. ESR Custom Rugs, Inc., 330 N.J. Super. 310, 749 A.2d 862 (App. Div. 2000) (declining to apply the entire controversy doctrine where the two lawsuits at issue did not involve the exact same defendants, the actions were based upon a different set of facts, and the allegations of the two actions "relate[d] to different controversies"). The

[4] The preclusionary effect of New Jersey's entire controversy doctrine is embodied in New Jersey Court Rule 4:30A, which provides as follows: "Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions)."

determination of CDE's coverage rights under the London Market Exxon Policies is in no way contingent or dependent upon the determination of any dispute between Exxon and Certain London Market Insurers concerning Exxon's obligations under the Settlement Agreement. Additionally, the New York forum selection clause of the 2000 Settlement Agreement is *prima facie* valid, and therefore should be enforced, despite New Jersey's public policy embodied in the entire controversy doctrine. *See*, McNeill v. Zoref, 297 N.J. Super. 213, 219, 687 A.2d 1052, 1055 (App. Div. 1997) ("Forum-selection clauses are enforceable in New Jersey. The United States Supreme Court has found them to be prima facie valid and they should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances.") (internal quotations and citations omitted). The court in McNeill further explained, "Such clauses will be enforced unless the party objecting thereto demonstrates (1) the clause is a result of fraud or overweening bargaining power, or (2) the enforcement in a foreign forum would violate strong public policy of the local forum, or (3) enforcement would be seriously inconvenient for the trial."[5]

In sum, the Exxon-only insurers, as parties to the 2000 Settlement Agreement, are necessary parties in any action addressed to the interpretation and/or application of the Settlement Agreement. As such, the resolution of the cross claim should not proceed without the Exxon-only insurers. Furthermore, the "entire controversy" doctrine does not require that the Exxon London Market Insurers' claim for indemnification under the Settlement Agreement be

[5] Ultimately, the court in McNeill chose not to enforce the parties' forum selection clause due to New Jersey's public policy concerns as embodied by the entire controversy doctrine. However, the forum selection clause in McNeill was subject to circumstances which served to limit its enforcement, including the fact that it arguably only applied to one defendant to the action and therefore did not serve to bind all parties to the litigation. Moreover, the entire controversy doctrine was limited in scope following the McNeill decision when Rule 4:30A was amended to only apply to "non-joinder of claims, as opposed to its earlier formulation of non-joinder of claims *and parties*." Highland Lakes, 201 N.J. 123 at 125, fn. 1 (emphasis in original).

joined with the underlying insurance coverage dispute. Finally, the forum selection provision in the Settlement Agreement must be enforced.

II. Exxon's Motion for Summary Judgment Must Be Denied

In the event this Court does not dismiss Exxon's Crossclaim in favor of the New York action, the Court should deny Exxon's Motion for Summary Judgment in its entirety, for several reasons. First, Exxon's argument that the indemnification obligations under the Settlement Agreement are limited to "future" claims only is contradicted by the clear terms of the Agreement. The indemnity language of the 2000 Settlement Agreement is broad and unconditional. A "four corners" reading of the agreement does not limit the indemnity to only future claims. Second, Exxon's assertion that CDE claims against the London Market Exxon Policies prior to the effective date of the Settlement Agreement is sheer fabrication. The undisputed facts are that CDE did not know of the existence of the London Market Exxon Policies until 2008 and did not assert a claim against those policies until January, 2009. Further, Exxon took the position with Exxon London Market Insurers, and in its pleadings before this Court that no claim was asserted until May, 2010.

Third, the waiver of the right to arbitrate does not, in any way, vitiate Exxon's indemnification obligations. The waiver was not imposed as a sanction for discovery misconduct and, in any event, Exxon London Market Insurers were under no obligation to demand arbitration. Further, to the extent that Exxon contends that the Exxon London Market Insurers negligently or improperly failed to "recognize" that the Exxon London Market Policies afforded direct coverage to CDE and/or that CDE, unbeknownst to anyone, had asserted a claim against the Policies, Exxon's views not only mirrored those of the Insurers, Exxon affirmatively contributed to those views.

A. Exxon's Indemnification Obligations Are Not Limited To "Future Claims" And, In Any Event CDE Did Not Assert Any Claims Against The London Market Exxon Policies Until January 2009

1. Exxon's Indemnity Obligation Under the 2000 Settlement Agreement is Not Limited to Only "Future Claims"

Nothing within the four corners of the 2000 Settlement Agreement serves to limit Exxon's obligation to defend and indemnify London Market Insurers to "future" claims. Exxon's belated contention that the 2000 Settlement Agreement indemnity provision only covers "future claims" was never raised as a condition or reservation in its May 11th letter accepting the tender of the defense of CDE's claims on behalf of the "Overlap Insurers" nor was raised in its Crossclaim.

Under applicable New York law, the New York Court of Appeals explained the "four corners" rule as follows:

> Whether an agreement is ambiguous is a question of law for the courts. Ambiguity is determined by looking within the four corners of the document, not to outside sources. The entire contract must be reviewed and particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought. Where the language chosen by the parties has a definite and precise meaning, there is no ambiguity.

Riverside South Planning Corp. v. CRP/Extell Riverside, L.P., 13 N.Y.3d 398, 404, 892 N.Y.S.2d 303, 307 (2009) (internal quotations and citations omitted). The court in Olin Corp. v. Consolidated Aluminum Corp., 807 F.Supp. 1133 (S.D.N.Y. 1992), *affirmed in part, vacated in part on other grounds in*, 5 F.3d 10 (2d Cir. 1993) described the "four corners" rule as applied in the context of deciding summary judgment, as follows:

> When the terms of an agreement are clear and unambiguous, a court will not look beyond the "four corners" of the document to determine what the parties meant. Provided that the language of an agreement is unambiguous and reasonable people could not differ on its meaning, a court may decide the proper interpretation of the language in the

> agreement. Conversely, if an ambiguity in the contract exists, then summary judgment is generally improper, because the principles governing summary judgment require that where contract language is susceptible of at least two fairly reasonable meanings, the parties have a right to present extrinsic evidence of their intent at the time of contracting.

807 F.Supp. at 1142 (internal quotations and citations omitted). On appeal, the Second Circuit further described a court's role in determining the intent of parties to an indemnification agreement. While acknowledging that New York indemnification agreements are strictly construed and that "a court cannot find a duty to indemnify absent manifestation of a clear and unmistakable intent to indemnify," the court nevertheless explained its role in determining the intent of the parties as follows:

> Under New York law it is our function to discern the intent of the parties to the extent their intent is evidenced by their written agreement. Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used.

5 F.3d at 14-15 (internal quotations and citations omitted); Walsh v. Morse Diesel, Inc., 143 A.D.2d 653, 655, 533 N.Y.S.2d 80, 82 (2d Dep't 1988) (cited by Exxon at p. 15 of its Memorandum of Law) (finding that the indemnification clause in the contract ". . . is written in the broadest terms . . . the intention to indemnify can be clearly implied from the language and purposes of the entire agreement"). The court in Walsh rejected the indemnitor's argument that despite the broad scope of the indemnification agreement ("to the extent permitted by law [A & M] shall save and hold harmless from and against all liability . . . "), the indemnification obligation was limited to circumstances in which the indemnitor's negligence had contributed to the accident. 143 A.D.2d at 655. Exxon incorrectly cited to the Walsh opinion for the proposition that "LMI has the burden of establishing the intent of the parties." The Walsh court actually held that the party relying upon the indemnity agreement must prove that the parties, in fact, entered into the agreement. The burden was on the indemnitor to come forward with proof

of facts sufficient to show that, in accordance with the unambiguous terms of the indemnification provision, the General Obligations Law applied because there was actual negligence on the part of the indemnitee. 143 A.D.2d at 656, 533 N.Y.S.2d at 82, 83. The Walsh court did not place the burden on either the indemnitor or indemnitee to establish the intent of the parties, because the contract at issue was unambiguous.

Here, the language of the 2000 Settlement Agreement is unambiguous. The intent of the parties is clearly implied from the language and purpose of the entire agreement. Nothing on the face of the Settlement Agreement, and the Indemnity Provisions in particular, limit Exxon's obligations to "future claims". Paragraph 4.1 of the Agreement provides in pertinent part: "Except as provided in Section 4.4 below, EXXON agrees that it shall defend, indemnify, save, and hold harmless each of the LONDON MARKET INSURERS that is entitled to benefit from the mutual release set forth in Section 3 above from and against all claims, ...arising out of the POLICIES and relating to ENVIRONMENTAL LIABILITY asserted by: ...(d) any former SUBSIDIARY or AFFILIATE of EXXON." Exxon argues that because the phrase "all claims" is not modified by the words "past, pending and future", "all" does not mean "all" but instead means "future" only. Exxon seeks justification for this bizarre re-definition of a plain and commonly understood word by referring to the Release provision in the Agreement which states that Exxon releases London Market Insurers ". . . with respect to any and all past, present or future claims . . ."

Exxon's attempt to rewrite the clear terms of the contract to limit the indemnification obligation is unavailing. First, Paragraph 4.1 must be read in its entirety. The phrase "all claims ...relating to ENVIRONMENTAL LIABILITY..." incorporates the Agreement's definition of the term "ENVIRONMENTAL LIABILITY": "ENVIRONMENTAL LIABILITY shall mean

any and all known or unknown, past, existing, potential or future claims, demands, suits...with respect to POLLUTION, against EXXON..." "EXXON", by definition, includes subsidiaries or affiliates as further defined in the Agreement. Paragraph 4.1 could not, therefore, be clearer: Exxon undertook to indemnify London Market Insurers from and against ALL CLAIMS arising under the policies and relating to "any and all known, past, existing, potential or future claims with respect to POLLUTION" asserted by any former subsidiary such as CDE.

Further, the plain language of Paragraph 4.1 makes clear that the only exceptions to the obligation to indemnify against ALL CLAIMS are those found at paragraph 4.4. Inexplicably, Exxon points to the exception at paragraph 4.4(b) as support for its position. This exception, however, which applies to "any expense or cost already incurred by the LONDON MARKET INSURERS before the mutual release ...becomes effective", in fact further demonstrates that the indemnification obligation applies to claims pending at the time the Settlement Agreement becomes effective. The exception is limited to expense or cost already incurred before the release. If, as posited by Exxon, the indemnification obligation applies only to future claims, there would have been no need for an exception for expense and cost already incurred. In fact, if the parties had agreed to except all but future claims from the indemnification of ALL CLAIMS, paragraph 4.4 would have been the perfect place to state the exception. It does not.

Exxon argues that the indemnity provision of the 2000 Settlement Agreement lacks express language referring to the "existing" claim by CDE against the Exxon policies. (See Exxon's Memorandum of Law at 14-15). Of course there was no "existing" claim, but, in any event, an indemnification agreement need not specifically list every liability indemnified where the agreement is clearly intended to be "all-inclusive" of past, present, and future claims. *See*, Purolator Products Corp. v. Allied-Signal, Inc., 772 F. Supp. 124, 135 (W.D.N.Y. 1991) ("where

the language of an indemnity agreement is all-inclusive, it must be given effect"). The various cases cited by Exxon offer no assistance here beyond their recitation of broad construction concepts. The determination of the meaning of specific provisions, and the determination of whether the provision is ambiguous are, of necessity, fact intensive with the focus on the particular words as well as the other terms and conditions of the agreement in its entirety. As to the general construction concepts, the cases cited by Exxon all provide that a contract shall be given retroactive application if the intent by the parties for retroactive application is made clear, by express terms or necessary implication (People v. Lee, 104 N.Y. 441, 450, 10 N.E. 884, 887 (1887); Quality King Distributors, Inc. v. E&M ESR, Inc., 36 A.D.3d 780, 827 N.Y.S.2d 700 (2d Dep't 2007); Akhenaten v. Najee, LLC, 2010 U.S. Dist. LEXIS 6227 (Jan. 26, 2010)), and that the court should not look to extrinsic evidence of intent unless it first finds the contract ambiguous. Lee, 104 N.Y. at 450, 10 N.E. at 887 ("It is, however, not permissible, we think, to resort to rules of construction in such a case as this, for there is no ambiguity in the language of the contract, and it provides in express terms for the [past] liability in question."); Quality King Distributors, Inc. v. E&M ESR, Inc., 36 A.D.3d 780, 827 N.Y.S.2d 700 (2d Dep't 2007) (resorting to the use of extrinsic evidence regarding the parties' intent, since the agreement at issue was found to be ambiguous).

The indemnity provision must be viewed in the context of the entire agreement, and construed to achieve the apparent purpose of Exxon and Certain Exxon London Market Insurers in entering into the settlement agreement. *See*, Hooper Associates, 74 N.Y.2d at 491 (cited by Exxon on numerous occasions, beginning on page 11 of its Memorandum of Law) ("Words in a contract are to be construed to achieve the apparent purpose of the parties."); Hatco, 59 F.3d at 405 (when determining whether an agreement is ambiguous, the court must look "to the

document as a whole rather than to sentences or clauses in isolation"); Szalkowski, 259 A.D.2d at 869 (a promise to indemnify must be found if "it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances."). Here, the 2000 Settlement Agreement must be read in its entirety to determine the apparent purpose and intent of the parties. When read in its entirety, the apparent purpose of the parties becomes obvious. The 2000 Settlement Agreement between Exxon and Certain Exxon London Market Insurers was intended to a provide a complete release and full indemnity in favor of Certain Exxon London Market Insurers, in which Exxon agreed to defend and indemnify Certain Exxon London Market Insurers for all third-party environmental claims. The language of the indemnity provision is unlimited in time, and does not carve-out indemnification for past claims.

Exxon's attempts to bolster its re-writing of the indemnification provisions by suggesting that, in hindsight, "Exxon would never have agreed to settle, if it had understood that it meant that it was going to become immediately liable for CDE's claims for hundreds of millions of dollars." Exxon Memorandum of Law, p. 15. Exxon also claims that it ". . . did not agree that the indemnity would still apply if the LMI waited nine years to disclose CDE's claim to Exxon, or if the LMI negligently failed to recognize CDE's claim under the Exxon London Policies, or if LMI waived important defenses, like the right to arbitration, or if the LMI passed up numerous opportunities to settle with CDE before the site cleanup costs skyrocketed." Exxon Memorandum of Law, pp. 15-16.

While Exxon may, in hindsight, now regret the settlement, it cannot simply walk away from its obligations because, having reaped the benefits of the settlement, it finds the consideration owed in the form of indemnity to be greater than anticipated. The fact is, in plain and unambiguous words, Exxon agreed to indemnify Exxon London Market Insurers against

ALL CLAIMS made by former subsidiaries against the Exxon London Market Policies relating to Environmental Liabilities. The only exceptions to the indemnification obligations are those set forth in Section 4.4 of the Agreement. Further, the undisputed facts show that Exxon's knowledge concerning CDE's coverage claims in June 2000 was equal to or greater than that of Exxon London Market Insurers. In June 2000, Exxon was aware that CDE had reported the South Plainfield claim to Ancon in 1989, 1992 and 1997. (Exxon London Market Insurers did not know in June, 2000 of the existence of the Ancon policy or that CDE had reported the claim to Ancon); in June 2000 Exxon was aware of the New Jersey Action (through FPE); and the parties' allegations, including FPE's and CDE's assertion of no coverage from July 1, 1980 despite the existence of the Ancon policy.

Exxon's protestations regarding "taking on" the CDE liabilities simply do not ring true. In particular, the CDE claim regarding South Plainfield against the Ancon policy was and is the same claim presented to the London Market Exxon Policies in January, 2009. In June 2000, Exxon/Ancon released London Market Insurers from all liabilities with respect to the reinsurance of Ancon. The liabilities retained by Exxon/Ancon by virtue of the release are no different than the liabilities assumed for any CDE claims against the London Market Exxon Policies by virtue of the indemnification agreement.

As to Exxon's other assertions, the undisputed facts are that neither CDE, Exxon London Market Insurers or Exxon recognized CDE's claim under the Exxon London Policies, nor did they acknowledge that any claim had been made prior to 2009. Absent knowledge of a claim, there could not have been a waiver of a right to arbitrate. Finally, there are no facts before the Court concerning "settlement opportunities" and, in any event, they are irrelevant.

In sum, there is nothing in the Settlement Agreement that limits the indemnification obligation to future claims.

B. CDE Did Not Make a Claim Against the Exxon Policies Prior to the 2000 Settlement Agreement

Exxon's assertion that CDE made a claim against the Exxon London Market Policies as early as 1992 and 1998 is pure fabrication. The undisputed facts are that neither the original nor amended complaints by Home, nor the original nor amended cross claims by CDE ever alleged that there were any policies in effect from July 1, 1980 and thereafter issued to Reliance and its subsidiaries and/or affording excess general liability coverage to them; to be sure, the pleadings in the litigation at no time identified the Exxon London Market Polices. CDE has consistently taken the position that it was not aware of the Exxon London Market policies and did not understand that they afforded coverage to CDE until late 2008. Exxon London Market Insurers have consistently maintained, and Judge Smithson specifically found, that they were not aware of the Exxon London Market Policies until mid-2007 (first the 1984 policy and the 1980-1983 policies sometime thereafter). In response to a 2001 subpoena for all policies affording general liability coverage to Reliance/CDE/FPE for the period 1980 – 1983, Exxon produced only the Ancon policy and made no mention of the Exxon London Market policies; in discovery addressed to the application of the Ancon policies to CDE's claims, Ancon/Exxon witnesses consistently testified that the only direct excess general liability coverage of Reliance and its subsidiaries was the Ancon policy. Further, prior to CDE's motion for summary judgment filed in June 2010, there has been no request for or adjudication of rights under the Exxon London Market Policies; the policies were not included in the liability trial conducted in 2004 regarding the South Plainfield site.

In its brief, Exxon states that by the time the 2000 Settlement Agreement was entered into, "CDE's claims against the Exxon London Policies dated back to the 1990's and already had been pending in litigation for approximately two years". The support for the statement is cited as Exhibits K, C and E to the Toriello Certification. Exhibit C is a March 27, 1992 letter from counsel for CDE addressed to "Lloyds London/Mendes & Mount"; the Reference is to six specific policies issued to Reliance for the period 1979-1980. The letter advises of the South Plainfield site claims. The letter states "CDE hereby claims coverage under the above-referenced policies with respect to the order . . . CDE also claims coverage and makes a similar demand under all other policies which you have issued on its behalf, even if not specifically listed." Exhibit E is CDE's Answer and Crossclaims served on October 1998. As noted above, there is no mention in the pleading of the London Exxon Policies or any coverage in effect from July 1, 1980. Exhibit K is the transcript of the September 10, 2010 hearing. Pages 31-32 referenced by CDE include the Court's comments on Exxon's motion to compel arbitration. In discussing the time elapse from the commencement of the litigation, the Court indicated that "I think I need to look back, you know to the 90's and '92 when the broad request was made and '99 when the discovery request was made and . . . I'm really basing my decision on what Judge Smithson found and Judge Smithson did, in fact, sanction Lloyds for not providing that information." There is simply nothing in the Court's discussion to suggest that a claim had been made by CDE against the Exxon London Market Policies prior to 2009; there is simply an explanation as to why the Court looked to a longer period for the time elapse from the commencement of the litigation.

Exxon's newfound position that the CDE claim against the Exxon London Market Policies was pending in 2000 is based solely on the proposition that a specific, identifiable claim

was asserted even though not a single party was aware of it. The determination of whether or not a claim was asserted must be based on knowledge by the parties of a claim with sufficient specificity to prompt a response, an appearance and/or some form of action or acknowledgment of the existence of the claim. None of those are present here.

Moreover, Exxon has repeatedly and consistently asserted, both in its communications with Exxon London Market Insurers and in Pleadings and Briefs submitted in this action, that CDE did not make a claim against the London Market Exxon Policies for its environmental liabilities prior to May, 2010. Significantly, in its opposition to CDE's motion for summary judgment concerning the London Market Exxon Policies, Exxon strongly advocated this factual position. Exxon has made the judicial admission that CDE did not make its claim against London Market Exxon Policies until several years following the Settlement Agreement.

Under New York law, a declaration of fact made by a party might be considered a "judicial admission" such that the party cannot later advocate a contrary fact. The New York Court of Appeals explained judicial admissions, and the difference between "formal" and "informal" judicial admissions, as follows:

> An informal judicial admission is a declaration made by a party in the course of any judicial proceeding (whether in the same or another case) inconsistent with the position the party now assumes. Such an admission is not conclusive on the defendant in the litigation but is merely evidence of the fact or facts admitted. By contrast, a formal judicial admission takes the place of evidence and is conclusive of the facts admitted in the action in which it is made. A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary.

People v. Brown, 98 N.Y.2d 226, 232 (2002) (internal quotations and citations omitted). Judicial admissions were described in greater detail by the New York Court of Appeals as follows:

> Informal judicial admissions are recognized as facts incidentally admitted during the trial or in some other judicial proceeding, as in statements made by a party as a witness, or contained in a deposition, a bill of particulars, or an affidavit. A formal judicial admission in one action may become an admission in the evidentiary sense in another action, and would be classified as an informal judicial admission in the later action. To be sure, they are not conclusive, though they are "evidence" of the fact or facts admitted. Furthermore, an admission in a pleading in one action is admissible against the pleader in another suit, provided it is shown by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction. Additionally, as Justice Gammerman correctly noted, it is irrelevant that the admissions were made in part by counsel on behalf of the Liquidator and that they were contained in affidavits or briefs.

Michigan National Bank-Oakland v. American Centennial Ins. Co., 89 N.Y.2d 94, 103, 674 N.E.2d 313, 317, 651 N.Y.S.2d 383, 387 (1996) (internal quotations and citations omitted).

Exxon has argued, on numerous occasions and in direct response to Certain Exxon London Market Insurers' repeated tender of defenses, that CDE had not made a claim against the London Market Exxon Policies concerning CDE's environmental liabilities. (See the Statement of Facts at Section G, *supra*). Significantly, Exxon opposed CDE's Motion for Summary Judgment Against the London Market Insurers with Respect to the Exxon Policies by asserting that CDE had never made a claim against the London Market Exxon Policies, until it sought summary judgment with respect to those policies. (See, Ex. 15 to the Maniatis Certification, the July 29, 2010 Intervenor Exxon Mobil Corporation's Memorandum of Law in Opposition to Cornell-Dubilier Electronics, Inc.'s Motion for Summary Judgment Against the London Market Insurers with Respect to the Exxon Policies, at page 4, et. seq., where Exxon strenuously argued, "CDE now claims for the first time in this motion for summary judgment that it is entitled to coverage under those Exxon Policies as a former subsidiary of Exxon.") Mr. Heckman's supporting declaration to Exxon's opposition asserted the same. In a surprise and complete about-face, Exxon now argues in the instant motion that CDE's claim against the London Market

Exxon Policies existed prior to the 2000 Settlement Agreement. Accordingly, this Court should take notice of Exxon's judicial admissions, and estop Exxon from advocating this contrary fact in a bald attempt to avoid its indemnity obligations.

C. The Waiver of the Arbitration Right Does Not Void Exxon's Indemnity Obligations; Exxon London Market Insurers Do Not Seek Indemnification For Misconduct

In a final, desperate attempt to avoid its indemnity obligations pursuant to the 2000 Settlement Agreement, Exxon claims that Certain Exxon London Market Insurers are barred from seeking indemnity from its own misconduct and, alternatively, Certain Exxon London Market Insurers' misconduct served as a breach of the 2000 Settlement Agreement. Neither contention has any merit, as the factual background and prior rulings of this Court prove otherwise.

In this Court's June 26, 2009 Opinion, Honorable Andrew J. Smithson imposed sanctions against Certain London Market Insurers for their failure to identify the London Market Exxon Policies in response to discovery requests earlier in litigation. However, Judge Smithson also recognized "the absence of a design to mislead" CDE (Ex. H to the Toriello Certification, the June 26, 2009 Opinion at p. 8), and that CDE's own conduct in attempting to preclude the use of post-1980 coverage in any Carter Wallace allocation, "discouraged any search for post-1980 policies" (Id). The Court even noted that "LMI had no reason to believe that additional policies covering CDE existed." Id. The Court accordingly limited its award of sanctions, and determined as follows: "[T]he dismissal of the LMIs' pleadings and defenses is not the appropriate remedy. Similarly, the LMI should not be estopped from arguing any defense to providing coverage under the Exxon policies." (Id. at p. 9). Based on the Court's ruling, Certain Exxon London Market Insurers did not waive and were not deemed to waive any defenses to

coverage under the London Market Exxon Policies, including the right to arbitrate as a sanction for failure to comply with discovery requests or otherwise. The liabilities for which indemnification is sought are those, if any, that will be imposed based on the operative facts and the terms and conditions of the policies through trial and/or summary adjudication.

Significantly, on September 10, 2010, the Court denied Exxon's Motion to Stay Litigation in Favor of Arbitration and to Compel Arbitration on the grounds of waiver based on the time elapsed from the commencement of the litigation, the amount of litigation that has transpired, and the prejudice to CDE. The Court did not rule that the waiver of arbitration was the result of a discovery sanction (which is consistent with Judge Smithson's June 26, 2009 Opinion) or any misconduct by Exxon London Market Insurers.

Additionally, Certain Exxon London Market Insurers were never under an obligation to demand arbitration against CDE or to raise arbitration as a defense to any coverage claims made by CDE under the London Market Exxon Policies. Absent language to the contrary, arbitration is not mandatory simply because a contract contains an arbitration provision. Rather, arbitration must first be demanded. *See*, Trentacost v. City of Passaic, 327 N.J. Super. 320, 743 A.2d 349 (App. Div. 2000). In Trentacost, the New Jersey court explained that where an arbitration provision provides that "either party shall have the right to submit the dispute to arbitration," arbitration of the dispute between the parties is not mandatory. 327 N.J. Super. at 325, 743 A.2d at 352. Instead, "either party can demand arbitration but, by the terms of the agreements, arbitration is not mandatory unless one party or the other demands it." Id. Like the contract in Trentacost, the arbitration provision here did not make arbitration mandatory. Moreover, Exxon cannot show that it would have demanded arbitration against CDE if Exxon was aware of the London Market Exxon Policies earlier, or that Exxon would have been successful in arbitration

such that it has been prejudiced by London Market Insurers. Significantly, neither Exxon nor London Market Insurers demanded arbitration in the California Action. Exxon, in connection with the joinder of Ancon in this action did not demand arbitration under the Ancon policy. Also, Exxon cannot show that it would have been successful in denying or limiting the coverage sought by CDE in an arbitration. Exxon does not, and cannot demonstrate that the issues raised in CDE's summary judgment motion and Exxon's opposition would have resolved any differently in arbitration. In contrast, the cases cited by Exxon involved exposure to indemnity agreements that had successful defenses, or were greatly increased, by the indemnitee's misconduct. *See*, Risk v. Risk, 138 Ind. App. 224, 213 N.E.2d 334 (1996) (cited by Exxon at p. 20) (ruling that the indemnitor could have successfully defended a third-party suit brought within the scope of the parties' agreement, but for the misconduct of the indemnitee); Dana Corp. v. Fireman's Fund Ins. Co., 169 F. Supp. 2d 732 (N.D.Ohio 1999) (cited by Exxon at p. 20) (ruling that the indemnitee's conduct caused a significant increase in exposure to the indemnitor).

In American Export Isbrandtsen Lines, Inc. v. United States of America, 390 F. Supp. 63 (S.D.N.Y. 1975) (cited by Exxon at pp. 20-21), the court found that the indemnitee's misconduct in failing to adequately defend against the liabilities at issue in litigation may or may not have resulted in lesser exposure to the indemnitor. The court nevertheless found that the indemnitee's misconduct in failing to adequately litigate the claim excused the indemnitor's obligation to reimburse the indemnitee. However, the American Export case is inapposite to the instant matter, because the indemnitee there, American Export, was aware of the exposure to the purported indemnitor, the United States, and litigated the underlying case in Italy without notifying the United States until the Italian action had concluded. The S.D.N.Y. found that American Export failed to produce relevant documentation or call certain witnesses in proper

defense of the case. Here, Certain Exxon London Market Insurers provided notice of CDE's claim or potential claim on the London Market Exxon Policies as soon as CDE indicated it would bring a claim. Also, unlike the indemnitee in American Export, Certain Exxon London Market Insurers have not failed to adequately litigate or otherwise defend against CDE's environmental claims directed against the London Market Exxon Policies. In contrast to American Export, Certain Exxon London Market Insurers' failure to identify and produce the London Market Exxon Policies was done without knowledge of those policies, and the resulting sanctions award was delivered prior to CDE's formal claim against those policies. Moreover, as noted above, Judge Smithson expressly limited his sanctions award to certain damages, while acknowledging that London Market Insurers "should not be estopped from arguing any defense to providing coverage under the Exxon policies."

Exxon also cannot establish that an arbitration Panel would have found that there is no coverage under the London Market Exxon Policies for CDE's claims in light of the New Jersey Court's September 10, 2010 and October 14, 2010 rulings denying CDE's Motion for Summary Judgment Against the London Market Exxon Policies without prejudice. Most of Exxon's coverage defenses under the London Market Exxon Policies as to CDE's claims were summarily rejected by the Court. Exxon cannot demonstrate that it was in any way harmed by adjudication of CDE's claims against the London Market Exxon Policies by the Court rather than through arbitration.

Finally, Exxon's own actions in the litigation demonstrate that Exxon London Market Insurers were neither negligent nor guilty of misconduct in their defense of the litigation. Exxon knew of CDE's Environmental Liability claims based upon Exxon Mobil Risk Management's responsibility for managing both the Ancon and Exxon insurance programs and upon its

indemnification of FPE for its environmental claims in this litigation, yet if failed to advise CDE or FPE of the potential availability of coverage under the London Market Exxon Policies. Even more, Exxon failed to fully respond to Allstate Insurance Company's 2001 subpoena by failing to produce copies of the London Market Exxon Polices when Exxon was specifically requested to do so by the plain language of that subpoena. Nor did Exxon identify or provide any information reflecting the existence of the London Market Exxon Policies in response to that subpoena.

As recognized by Judge Smithson, Exxon's production of only the Ancon policy, coupled with CDE's denial of post-July 1, 1980 coverage, led to Exxon London Market Insurers' conclusion that there were no other direct excess policies issued to CDE. Further, Exxon continues in its position that the London Market Exxon Policies were not intended to provide direct coverage to CDE. How can Exxon claim that Exxon London Market Insurers were negligent, or engaged in misconduct, when their actions mirror those of Exxon?

Exxon is to blame for the same actions (or inactions) of Certain Exxon London Market Insurers that Exxon has argued violates the 2000 Settlement Agreement, i.e. – failing to disclose the existence of the London Market Exxon Policies and recognize potential direct coverage under the Exxon policies. Finally, Exxon's claim that Exxon London Market Insurers breached the terms of the Settlement Agreement by failing to advise Exxon of CDE's claims and defending the claims without Exxon's input prior to March 2009 are predicated on the fiction that CDE had asserted such claims, and Exxon London Market Insurers were aware of such claims. Clearly, one cannot report or defend against a non-existent claim nor can one report or defend against a claim whose existence is unknown. Exxon's claim of breach is not merely

baseless, it is disingenuous given Exxon's persistent denial that any claim had been made prior to May 2010.

III. Exxon's Motion for Summary Judgment is Premature

Certain Exxon London Market Insurers aver that the relief sought by Exxon is premature. The Appellate Division denied Exxon's motion for leave to appeal from the trial court's denial of Exxon's Motion to Stay Litigation in Favor of Arbitration and to Compel Arbitration, and it dismissed the notice of appeal "as of right" as interlocutory. Exxon's instant Motion for Summary Judgment is therefore premised upon legal issues that have yet to be fully litigated. Where a motion for summary judgment is subject to pending litigation that has yet come to a final determination, the court should deny summary judgment pending the resolution of those predicate legal issues. *See generally*, Frank A. Greek & Sons, Inc. v. Township of South Brunswick, 257 N.J. Super. 94, 607 A.2d 1359 (App. Div. 1992) (denying a portion of summary judgment that was predicated upon prior appellate proceedings that had yet to be resolved). New York law requires the same result. *See, e.g.*, American Home Assurance Co. v. Port Authority of New York and New Jersey, 66 A.D.2d 269, 412 N.Y.S.2d 605 (1st Dep't 1979) (denying an insurer summary judgment where judgment was predicated upon the resolution of an underlying lawsuit directed towards the policyholder).

CONCLUSION

For the aforementioned reasons, Defendants Certain Exxon London Market Insurers respectfully request that this Court grant their Cross-Motion to Dismiss in favor of the action currently pending in New York Supreme Court, New York County. Alternatively, Defendants Certain Exxon London Market Insurers respectfully request that Exxon's Motion for Summary

Judgment Against London Market Insurers On Indemnity With Respect To The Exxon London Policies be denied in its entirety.

Respectfully Submitted,

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Of Counsel

Dated: April 5, 2011

Attachment A To Certain Exxon London Market Insurers' Memorandum of Law

Certain Underwriters at Lloyd's, London syndicates subscribing to the London Market Exxon Policies	
35	408
56	417
69	427
99	471
109	472
126	518
175	553
190	604
210	618
219	620
231	651
235	653
263	661
278	694
283	701
297	763
316	768
317	857
346	918
365	921
383	948

Certain London Market Insurance Companies subscribing to the London Market Exxon Policies

CNA Reinsurance Co., Ltd.;
Compagnie Europeene d'Assurances Industrielles S.A.;
Excess Insurance Co., Ltd.;
St. Katherine Insurance Co.;
Stronghold Insurance Co., Ltd.;
Unionamerica Insurance Co., Ltd.;
Winterthur Swiss Insurance Co., Ltd.;
Wurttembergische Feuer Per Coggia;
Yasuda Fire & Marine Insurance Co. (UK), Ltd.

Attachment B To Certain Exxon London Market Insurers' Memorandum of Law

London Market Exxon Policies

1 January 1980- 1 January 1981

80BH1799; 80BH1800; 80BH1801; 80BH1802; 80BH1803; 80BH1804; 80BH1805; 80BH1806; and 80BH1807

1 January 1981- 1 January 1982

1HB14830; 1HB14840; 1HB14850; 1HB14860; 1HB14870; 1HB14880; 1HB14890; 1HB14900; and 1HB14910

1 January 1982 – 1 November 1982

2KA16950; 2KA16960; 2KA16970; 2KA16980; 2KA16990; 2KA17000; 2KA17010; and 2KA17020

1 November 1982 – 1 November 1983

3KA06700; 3KA06710; 3KA06720; 3KA06730; 3KA06740; 3KA06750; and 3KA06760

Attachment C To Certain Exxon London Market Insurers' Memorandum of Law

Certain Underwriters at Lloyd's, London syndicates that subscribed to the London Market Exxon Policies but did not subscribe to the FPE/Reliance Policies and have not been joined or appeared in the New Jersey Action			
052	264	494	744
062	267	505	746
063	272	506	754
065	273	552	764
067	275	568	804
068	276	573	812
079	282	601	818
080	284	606	842
083	288	625	843
087	289	626	855
098	299	630	856
108	304	631	868
116	313	632	869
123	315	633	890
127	334	636	898
132	358	638	899
133	368	645	901
145	379	646	908
160	401	656	909
178	406	662	926
180	412	687	927
185	418	688	928
188	438	697	933
196	441	698	935
203	446	700	937
206	448	707	961
207	473	722	972
209	474	725	978
239	483	727	
247	488	735	
248	493	737	

Certain London Market Insurance Companies that subscribed to the London Market Exxon Policies but did not subscribe to the FPE/Reliance Policies and have not been joined or appeared in the New Jersey Action

Assurances Generales de France, U.K.;
Bishopsgate Insurance Company;
British Law Insurance Company;
Commercial Union Assurance Company Ltd.;
Cornhill Insurance;
Danish Marine per ICI;
Dowa Insurance Co. (UK) Limited;
Generali Insurance Company;

Hansa Marine Insurance Company;
Insurance Company of North America;
Indemnity Marine Insurance Company;
Iron Trades Mutual Insurance Company Limited;
London Assurance Company;
Marine Assurance Company;
Nippon Insurance Company;
Phoenix Assurance Public Limited Company;
Polaris Assurance Company;
Provincial Insurance plc;
River Thames;
Road Transport & General Insurance Company;
Royal Insurance;
Scottish Lion Insurance Company;
Skandia Insurance Company;
Sphere Insurance Company;
The Sumitomo Marine & Fire Insurance Company (Europe);
Terra Nova Insurance Company;
Threadneedle Insurance Company;
Turegum Insurance Company